

BOOK REVIEW

## Book Review: Jens Meierhenrich's *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*

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### Abstract

Meierhenrich's book is an important book. For those seeking to learn about law under Nazism, it gives an excellent introduction. It is also highly relevant to the understanding of the general relationship between law and authoritarianism. This makes the book important for all who are concerned about the fate of the rule of law today.

**Keywords:** Nazi law; authoritarian legalism; rule of law; dual state; institutionalism

Do we need yet another book on the law of the Nazis? The last few years have seen an escalation of the interest in this topic and a surge of new books and articles on the subject. Apart from the historical interest, the topic of law and authoritarianism has gained new relevance through political development in several countries where the executive power seeks to dominate the legal institutions. Understanding law's authoritarian past within our own legal tradition can give important insights to the understanding of this phenomenon, as well as to the preservation of legal autonomy when the rule of law is under attack. Jens Meierhenrich seeks to contribute to such understanding with his important new book on law, legalism, and the rule of law within Germany under Nazi rule.

*The Remnants of the Rechtsstaat* approaches Nazi law by presenting the life and work of the German lawyer and social theorist Ernst Fraenkel. Based on the work of Fraenkel, Meierhenrich seeks to lay the foundation for a theory of the authoritarian rule of law in general—a cutting-edge topic in socio-legal studies with immediate policy implications.

After the introduction in Chapter One, Chapter Two of the book gives a critique of the dominant view from the years after the war, that the Nazi state was a lawless state. In line with the analysis of David Fraser in *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (2005), Meierhenrich dismisses this view. In Chapter Three, we are presented with the life and work of Ernst Fraenkel. Fraenkel was an émigré from Germany to the United States, where he published his seminal work, *The Dual State*, in 1941. This was the first theoretical analysis of the rise and logic of the Nazi legal order. Fraenkel was of Jewish origin and practiced law in the 1930s until 1938 when he fled the country. During this time, he became increasingly engaged in representing political activists on the left, and through this, he obtained a unique insight into the workings of the legal order and the legal institutions.

Chapter Four surveys the history of the idea of the *Rechtsstaat*. The evolution of the term is traced from its emergence in the late eighteenth century until 1933.

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In Chapter Five, the book presents the core of the Nazi legalism through a presentation and analysis of Nazi legal thought and scholarship. Here, Meierhenrich presents the Nazis' conception of law and how the Nazi lawyers redefined the concept of *Rechtsstaat* to fit their purposes. An important element here is how they defined their legal order in contrast to the Soviet system, which they perceived as a *Nichtrechtsstaat*. Meierhenrich revisits this contrast to the Soviet law later in the book. An important insight from this analysis is that the German jurists—even the most hardened Nazis among them—thought of themselves as agents of law.<sup>1</sup> Therefore, it was impossible to purge the system of all norms and institutions from the previous regime, and the legal institutions continued to operate as legal institutions within the space left by the increasingly dominant and repressive prerogative state.

Fraenkel's theory of the dual state is presented and discussed in Chapters Six and Seven. Central to Fraenkel's theory is the prevailing of what he calls the normative state, despite the rise of the political and oppressive prerogative state. By the prerogative state, Fraenkel referred to the "governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees,"<sup>2</sup> and by the normative state, "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies."<sup>3</sup> Both states existed simultaneously, but the normative state existed under the acquiescence of the prerogative state. The Gestapo and the Schutzstaffel (SS) had the power to transfer entire spheres of life from the jurisdiction of the normative state to the prerogative state.

This was not a division between the state and the party but a division within the state. The presumption of jurisdiction rested with the normative state. The Nazi Party, for instance, was not exempt from the law and the jurisdiction of the courts, only the acts of Party officials acting within the scope of their political authority. The authority to decide jurisdiction rested with the prerogative state. Legal institutions were not abolished, and law continued to operate in daily life. There was continuity in the rules, institutions, and their personnel. Even in cases of a political nature, law was not merely a façade. Judging mattered, and there were cases when judges went against the regime.

Why did the normative state prevail within Nazi Germany? Why did the Nazis not do away with law and legal institutions? Here, Fraenkel employs both economic and institutional explanations. Meierhenrich does not explicitly take a stand on Fraenkel's explanation of the dual state in Germany, but he seems to accept it. Fraenkel takes the traditional socialist approach that Nazism was the result of capitalism defending itself against the social and economic crisis. From this perspective, maintenance of the normative state was essential to the economic interests of the capitalist class. Fraenkel included in his analysis, however, the need to accommodate norms and values embedded in society, thus also a need for law.

Chapter Eight deals with the reception of Fraenkel's theory, both in his own time and in the post-war discussions of the Nazi state. Fraenkel returned to Germany where he died in 1975, shortly after the publication of the first official German edition of *The Dual State*. It took another ten years for his work to achieve general acclaim in Germany.

In Chapter Nine, Meierhenrich discusses the usefulness of the concept of the dual state in analyzing authoritarian regimes and authoritarian rule of law more generally. This is where he turns to the relevance of the theory in considering the contemporary situation. His thesis here is that Fraenkel's theory is directly relevant to the answering of the question of how law can be invoked to constrain political power and how far we can expect law to be a force for good or for evil.<sup>4</sup> A central concept here is authoritarian legalism, which describes the social practice of conducting authoritarian politics by legal means. Not all authoritarian states that practice authoritarian legalism are dual states; in some cases, the reference to law is a pure façade. Conditions that must be met—according to

<sup>1</sup>JENS MEIERHENRICH, *THE REMNANTS OF THE RECHTSSTAAT: AN ETHNOGRAPHY OF NAZI LAW* 156 (2018).

<sup>2</sup>*Id.* at XX.

<sup>3</sup>*Id.* at XX.

<sup>4</sup>*Id.* at 226.

Meierhenrich—for a state to be a dual state are that a non-trivial portion of everyday life is governed by legal rules, that the legal rules governing everyday life are reasonably effective and reliable, and that the operation and reliability of the legal rules are common knowledge.<sup>5</sup>

The real importance of Meierhenrich's book is his effort to come to grips with the role of law and legalism in authoritarian states more generally. This is not least important today, with countries in Europe that experience “rule of law backsliding” and that proclaim to be “illiberal democracies.”<sup>6</sup> To what extent does the concept of the dual state fit the order of governance of other authoritarian states in the twentieth and twenty-first centuries? One way of testing this is by using the concept of the dual state to analyze the other main authoritarian system of the twentieth century: Communism.

Several scholars have employed Fraenkel's categories to the Soviet State and claimed that it too can be divided into a prerogative state, governed directly by the rule of force, and a normative state, regulated through a system of sanctioned legal norms prescribing the permissible boundaries of interpersonal relations and citizen-state relations. Meierhenrich extends this classification to present-day Russia and emphasized that everyday law remnants of the Rechtsstaat have survived the attacks by Putin's Prerogative State.

Law coexisted with the unbridled use of political force in the European communist states of the twentieth century. The communist rulers used law and legal institutions as part of their repertoire to dominate society and oppress opposition. Does this mean that the communist countries were dual states in the sense employed by Ernst Fraenkel and that their approach to law can be compared to the approach of the Nazis? In my opinion, no. Both regimes employed terror as a main instrument of oppression, and both had law. But in Russia, terror was initially employed alongside legal nihilism, and the legal institutions were systematically dismantled and broken. When the legal institutions were rebuilt, this became part of their genetic material. Soviet law was not steeped in the Western legal tradition in the way German law was.

The Russian experience was that law was necessary, and that to govern the country without law was unsustainable in the long run. The new law was constructed only partly based on the old laws but with a firm grip of the Party on legal institutions. There was no presumption of jurisdiction for the normative state, and the prerogative state was not limited to one sector such as the SS and to the Supreme leader himself.<sup>7</sup> There was no normative state comparable to the normative state of Germany during the Nazi period. There were significant differences in the way that the Party and the organs of the prerogative state interfered and intervened in the legal process before the courts under Nazism and communism.

Common for both regimes was that the law could be broken for reasons of political expediency. In this way, the normative state was subordinated to the prerogative state, and—to use Fraenkel's terminology—the limits of the normative state were defined by the prerogative state. But the means of intervention were different. At the highest level of the Nazi State, Hitler personally was the ultimate judge with a right to intervene in any court case. He seldom used this right, however, and others were prohibited to intervene on his behalf. Under the Soviet system, Party functionaries could intervene at any level. The Party and the State were free to break the law with impunity.

In Nazi Germany, the normal organs of the state were subject to the law. The right to operate outside the scope of the law was reserved for the Party, the SS, and its organs. For this reason, the concentration camps and the extermination camps—as well as the Gestapo—operated unhindered by the law and the ordinary courts. On the one hand, they could not interfere in judicial proceedings; but on the other hand, they did not need to respect the rulings of a court. But even the prerogative

<sup>5</sup>*Id.* at 239.

<sup>6</sup>Laurent Pech – Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*. *Cambridge Yearbook of European Legal Studies* 2017, pp. 3–47

<sup>7</sup>*Id.* at XX.

state operated under some sort of normativity with the system of SS courts, exercising a degree of judicial review inside the SS. The SS courts were expected to follow both the SS ethos and to follow the rule of law. The terror and torture within the camps was regulated by rules, and breaches of these rules by camp guards were sometimes enforced.

The German judges acted independently and were not subject to political instructions or interference. The communist judges were bound to the Party and subject to directives of Party officials. Only in this way could the judiciary function as a mechanism to realize the class-politics of the Communist Party. Under the communist approach to law, the law and the judges were totally subordinated to politics and the Party.

Outside the scope of the prerogative state, life under both types of regime was regulated by legal norms, and people—at least in principle—had access to courts. The law and the courts also functioned for everyday life in the communist states. From this perspective, the law under communism can be characterized as dual. Meierhenrich claims that an authoritarian regime is ruled by a normative State when a significant part of the everyday life of the members of society is governed by remnants of the rule of law.

It is obviously true that a modern society requires some mechanism for the settlement of disputes and conflicts between citizens according to rules that are calculable in advance. This was the experience of the revolutionary Soviet reformists. The consequence of this is that if we, in considering the dual state, understand it as a state that offers settlement of disputes by law of trivial and non-political conflicts, then the concept of the dual state is unable to distinguish between diverse types of authoritarian state. As there are obvious differences in the approach to law between the Nazis and the communists, another framework would be necessary to capture these differences.

Meierhenrich's theoretical approach is the new institutionalism, where the law of the Third Reich is understood in institutional terms. This entails that legal practices and legal consciousness are carried forward from an ancient regime that continues to structure the politics of authoritarian rule.<sup>8</sup> Through this institutional approach, Meierhenrich shows the embeddedness of Nazi law in the German legal past. The relationship that he describes, however, is a rather thin one—particularly when it comes to his treatment of the *Rechtsstaat*-tradition. To Meierhenrich, this is mostly a theoretical concept and a child of the liberalism of enlightenment. It is of course true that the word *Rechtsstaat* was coined out of these revolutionary times. But the conceptions, values, and practices that are embraced by the term are much older, and this is deeper embedded in the German legal institutions as part of the Western legal tradition.<sup>9</sup>

Meierhenrich's focus on concepts and theory may be due to his understanding of institution and institutional theory. In his analysis, institution is almost conflated with organization, and he puts more emphasis on actors, intents, and interests than on structure, norm, and path dependence. This is particularly evident in his discussion on Fraenkel's views on the economic origins of the dual state in Chapter Seven. The explanations given here are more of a rational choice and functional kind than institutional. A thicker concept of institution, however, is necessary to understand the relationship between law and power and the role of law under authoritarian rule.

Regardless of this, Meierhenrich's book is an important book. For those seeking to learn about law under Nazism it gives an excellent introduction. It is also highly relevant to the understanding of the general relationship between law and authoritarianism. This makes the book important for all who are concerned about the fate of the rule of law today.

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<sup>8</sup>*Id.* at 11.

<sup>9</sup>See Hans Petter Graver, *Judicial Independence Under Authoritarian Rule: An Institutional Approach to the Legal Tradition of the West*, 10 HAGUE J. RULE LAW 317 (2018).